Supreme Court, U.S.
FILED
JAN 19 1999
CLERK

No. 98-131

In The

Supreme Court of the United States

October Term, 1998

THE UNITED STATES OF AMERICA,

Petitioner,

v.

SUN-DIAMOND GROWERS OF CALIFORNIA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF AMERICAN LEAGUE OF LOBBYISTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF AMERICAN LEAGUE OF LOBBYISTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American League of Lobbyists ("ALL") files this *amicus* brief in support of respondent, Sun-Diamond Growers of California, pursuant to this Court's Rule 37.3(a).* ALL also appeared as *amicus* in support of Sun-Diamond Growers of California in the proceedings below before the D.C. Circuit. Both petitioner and respondent have consented to the filing of this *amicus* brief, and letters of consent have been filed with the Clerk of this Court. Sup. Ct. R. 37.3.

INTEREST OF AMICUS

The American League of Lobbyists is a national association of more than 500 government relations and public affairs professionals and includes a wide cross-section of individuals, law and lobbying firms, small and large businesses, and nonprofit organizations. ALL works in a variety of ways to support and advance the interests of its members through education, outreach, and advocacy programs. Its members have associated to protect the ability of lobbyists to pursue their vocation and effectively to represent the interests of their clients, employers, and constituents before government entities.

ALL has adopted Guidelines for Professional Conduct governing its members and encourages the implementation and advancement of ethical lobbying practices. ALL worked hard to reform and strengthen federal lobbying disclosure laws and supports vigorous enforcement of laws designed to eliminate corrupt practices. Its

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* Counsel for neither party authored this brief in whole or in part. No person or entity, other than the *amicus* ALL, made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6.

speakers' bureau sends lobbyists to talk about the profession with elementary school classes and foreign visitors. In sum, ALL members are proud of their profession and fully support the gratuity statute's goal of criminalizing corrupt practices that may on occasion infect that profession.

The Independent Counsel's interpretation of the gratuity statute, in ALL's view, poses an unintended, unnecessary, and unwise burden on the exercise by American citizens and their advocates of constitutionally protected rights. Lobbying – which is but the modern embodiment of the right to petition recognized as early as the *Magna Carta* – has long been seen as a constituent of the panoply of First Amendment rights to engage in political speech, to petition the government for redress of grievances, and of association. To risk chilling or impeding these constitutional rights through imposition of criminal sanctions calls for great caution, for it risks undermining a fundamental safeguard of democracy: The individual's right to seek to influence government.

It is critically important to citizens and the lobbyists who represent them that the gratuity statute's bright-line rule regarding intent be given the full force intended by Congress. Otherwise, those interacting with congressional and executive branch officials (and judges) may not readily be able to determine whether their actions constitute the legitimate exercise of protected First Amendment rights – or criminal behavior. If the statute's carefully worded intent requirement is not given effect, normal social interaction and benign personal relationships between lobbyists and federal officials will fall under the specter of criminal prosecution.

Members of the American League of Lobbyists and their clients, employers, and constituents interact with government officials each day. ALL is confident that, in

enacting the gratuity statute, Congress meant what it said and did not intend to criminalize a broad range of gift-related conduct without regard to any dangers that may or may not be presented. The isolation of government officials from the citizens they interact with or represent is not a result intended by Congress. Implementing the plain language of this law consistent with the historic system of criminalizing gifts given with corrupt intent, while reserving control over the appearance of impropriety associated with benign gifts to civil and administrative regulation, furthers congressional intent and minimizes any potential for chilling the exercise of First Amendment rights.

SUMMARY OF THE ARGUMENT

The gratuity statute imposes criminal liability only upon those who provide something of value to a covered official "for or because of any official act performed or to be performed." The question before this Court is whether this phrase means what it says or, instead, whether it should be interpreted to mean "for or because of an official's position" (the Independent Counsel's argument) or "for or because of an official's capacity to act" (the Department of Justice's position). These alternatives plainly would dilute the intent or mens rea requirement of the statute. They would eviscerate Congress' bright-line rule that separates innocent from criminal conduct, replacing the statute's focus on a specific link in the donor's mind between the gift and an official act with an ephemeral requirement that the gift only be to an official in a position to benefit the donor in some way in the future. The alternative readings of the gratuity statute that diminish its intent requirement conflict with the plain language of the act.

The existing statutory and regulatory schemes recognize three tiers of gift-giving and deal appropriately with issues presented by each type of conduct. Bribery, as a direct assault on the integrity of the political system, carries heavy criminal penalties. Gratuities given for or because of an official act, although not as serious as bribery, may have similar corrupting influences on government and, thus, also trigger significant penalties. Gratuities not motivated by "a specific official action performed or to be performed" – ones that are not inevitably nefarious – do not merit criminal sanctions and may even be beneficial. As recognized by Congress, this conduct is best controlled by the flexibility of regulation. Thus, a balanced scheme for addressing the giving of gifts to officials has been established; any shift in that balance should remain the province of Congress.

The "position" or "capacity" interpretations of the gratuity statute also violate important rules of statutory construction. First, statutes must be interpreted, where possible, to avoid infringing First Amendment rights in the absence of clear congressional intent to the contrary. Lobbying has repeatedly been recognized as implicating First Amendment rights of association, free speech, and petition. Imposing criminal liability for gifts made to officials who may have the authority to affect the donor's interests at some indefinite time in the future would criminalize many normal social interactions between citizens and their representatives. Obstruction of these contacts would chill the exercise of First Amendment rights while hampering the government's ability to function effectively. The ability of lobbyists to develop and maintain legitimate relationships with government officials – which effectuate the citizen's right to petition, facilitate the flow of information, and inform decisionmaking –

would be severely and unnecessarily hindered by the fear of criminal prosecution.

Moreover, an attack on the statute's mens rea requirement directly conflicts with the interpretative presumptions favoring criminal defendants. Where a criminal statute is ambiguous or silent on that element, mens rea is to be presumed absent a clear congressional intent to the contrary. Where, as here, the statute explicitly imposes a mens rea requirement, it must be given full effect. Otherwise the statute would treat innocuous conduct as criminal, shocking the average person and depriving potential criminal defendants of notice of what is being sanctioned. Imprecise standards for criminal liability are disfavored as a general matter, more so where the conduct condemned is associated with the protected rights of speech, association, and petition.

The legislative history of the gratuity statute does not point to a contrary conclusion. Congress intended no conflict between the gratuity statute and either First Amendment rights or rights of criminal defendants. Accordingly, the Court should give full effect to the plain statutory language requiring that a gift deemed unlawful have been provided "for or because of any official act."

ARGUMENT

Congress clearly expressed through plain statutory language its intent to limit criminal liability to those who directly endanger the health of the political system by engaging in bribery or the lesser offense of providing a thing of value to a public official "for or because of any official action performed or to be performed." Congress chose not to criminalize conduct falling outside these two categories although it easily could have (and did in other statutes). Instead, it has ceded to each branch of government the delicate task of

separating acceptable and beneficial social conduct from conduct that might present an indirect danger or appearance of corruption. *See* 5 U.S.C. § 7353. All three branches have adopted comprehensive and finely tuned noncriminal regulations governing the receipt of gifts by their members. *See* 5 C.F.R. § 2635.101, *et seq.*; H.R. Rule XXVI (amended Jan. 6, 1998) (previously H.R. Rule LI); S. Rule XXXV(1)(a), (c) (amended July 18, 1995); Code of Conduct for United States Judges Canon 5(C)(4).

Any interpretation of the gratuity statute indiscriminately criminalizing gift-giving motivated even partially by an official's mere capacity to affect the potential interests of the donor would introduce chaos into a well-ordered regulatory and statutory scheme. Such an interpretation would (1) blur the bright-line rule regarding the imposition of criminal liability established by the plain statutory language and (2) transform the administrative regulations governing gifts from a source of guidance regarding permissible conduct into a source of confusion by criminalizing conduct expressly permitted by those rules. The specter of criminal prosecution for an inadvertent step over an amorphous line between criminal and innocent conduct will severely chill normal social interactions between citizens and government officials. This enforced isolation of government officials from the individuals they represent will impinge upon the effective exercise of the First Amendment rights of association, speech, and petition and will hamper the effective functioning of our representative government.

I. "For or Because of Any Official Act Performed or To Be Performed" Means What It Says.

The question presented is whether the apparently clear phrase "for or because of any official act performed

or to be performed" can be construed to mean "for or because of an official's position" or "for or because of an official's capacity to act." The first step in statutory analysis is, of course, to look to the language of the statute. "If the statute is clear and unambiguous that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress." *K mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (internal quotation omitted); *Rubin v. U.S.*, 449 U.S. 424, 430 (1981). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Id.* (internal citations omitted). Absent evidence to the contrary, courts should presume that Congress intends the common meanings of the statutory terms to apply. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs., Ltd. Partnership*, 507 U.S. 380, 388 (1993). Generally, Courts do not go beyond the statute's language unless that language is ambiguous or produces absurd results. *See Darby v. Cisneros*, 509 U.S. 137, 147 (1993); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). Here, the Court need not go beyond the first step. Congress meant what it said: Only one who provides a thing of value to a covered official "for or because of any official act performed or to be performed" violates the gratuity statute. *See Connecticut Nat'l Bank v. Germaine*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . [W]hen the words of a statute are unambiguous . . . judicial inquiry is complete.") (internal quotation omitted).

A. The Plain Language of the Mens Rea Element Requires that the Gift Be Motivated by an Official Act Actually Contemplated by the Donor.

The gratuity statute provides that "whoever otherwise than as provided by law for the proper discharge of official duty directly or indirectly gives, offers or promises anything of value to any public official, former public official, or person selected to be a public official, *for or because of any official act performed or to be performed* by such public official, former public official, or person selected to be a public official" violates the statute. 18 U.S.C. § 201(c)(1)(A) (emphasis added). An "official act" is defined as "any decision or action upon any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such public official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

The natural reading of this provision is that one who provides anything of value "for or because" of a "decision or action" "performed or to be performed" at any time by a person acting in his official capacity violates the gratuity statute. In other words, the statute would impose criminal liability on any donor who gave a thing of value to a covered official for or because of a specific act (or acts) either already performed or that the donor hoped would be performed by the official in the future. The words chosen by Congress to define "official act" and the modifying phrase "performed or to be performed" are not terms of art. Accordingly, the Court should interpret those words according to their common meanings. *See Pioneer Inv. Servs. Co.*, 507 U.S. at 388. This reading gives effect to all the words defining the mens rea requirement and the underlying definition of "official act" without eliminating or substituting any words. *See United States v.*

Menasche, 348 U.S. 528, 538-39 (1955) (Statutes must be interpreted "to give effect, if possible, to every clause and word.") (internal quotation omitted).

The same cannot be said for the Independent Counsel's interpretation of this language. He argues that "for or because of any official act performed or to be performed" really means "for or because of an official's position" when the donee has actual or potential authority over the donor. *See* Pet. Br. at 15-17. According to the Independent Counsel, the only donative intent that is required to violate the gratuity statute is that the donor be motivated in some degree by the official's position. The jury instructions proposed by the Independent Counsel and used by the District Court adopted this "official position" interpretation. For example, the Court instructed the jury that:

> The gratuity statute makes it a crime for a person or company to knowingly and willfully give a public official a thing of value *because of his official position whether or not the giver or receiver intended that particular official's acts be influenced.* Pet. App. 84 (emphasis added).
>
> [T]he government must prove that the gratuity was knowingly and willingly given for or because of an *official act performed or to be performed* by the Secretary of Agriculture, Michael Espy. That *means* that the government must prove that [respondent] . . . knowingly and willingly gave the gratuities, *at least in part, because of the Secretary's position in appreciation of [respondent's] relationship with him as a public official or in anticipation of the continuation of its relationship with him as a public official.* Pet. App. 87 (emphasis added).
>
> *The government need not prove that the alleged gratuity was linked to a specific or identifiable official act or to any act at all.* In other words, the

> government need not prove that the gratuity was given as a quid pro quo, that is, in exchange for any one specific action performed or to be performed by the Secretary. Pet. App. 87 (emphasis added).

As noted by the D.C. Circuit and Solicitor General, under that interpretation the donor need not intend that the official exercise his power at all. *See United States v. Sun-Diamond Growers*, 138 F.3d 961, 968 (D.C. Cir. 1998); DOJ Brief at 14-19. By substituting "official position" for "any official act performed or to be performed," the Independent Counsel eliminates the requirement that the donor intend that an "official action" be performed by the donee, thereby dramatically diluting the statutory mens rea factor.

The following individuals would be guilty of a gratuity violation under this expansive interpretation: (1) an individual taking a friend out to dinner to celebrate the friend's new promotion as an IRS agent; (2) an employee of the Smithsonian who invites the Director of the National Endowment of the Arts to a fundraiser as a draw for guests; (3) a Sunday morning talk show host who takes the Director of the FBI to a public lunch to impress potential guests. Even if these individuals could prove that they were totally indifferent to the manner in which the official exercised his authority, they would be guilty under the "official position" interpretation of the gratuity statute because they were within the potential authority of the donees and the gifts were motivated by the donees' official positions. *See* DOJ Br. at 13 (noting that the "official position" interpretation would erroneously subject such conduct to criminal liability).

Although recognizing that the preceding interpretation is flawed because it eviscerates the statutorily required link between donative intent and the exercise of official power, the Department of Justice formulation of

the donative intent required to trigger criminal liability is so attenuated as to be almost meaningless. It contends that this required link between donative intent and an "official act" is satisfied so long as the donor's gift is motivated *in any degree* by a realization that the donee official may at some time in the future exercise his authority to benefit the donor in some undefined way. *See* DOJ Br. at 18 (a gift motivated "at least in part" by official capacity is a gratuity). The Department of Justice states: "It is sufficient to show that the gift was motivated by the recipient's perceived *capacity* to assist the donor through the exercise of his official power or influence, *even if the particular acts that might affect the donor's interests are neither specified nor even known at the time of the gift.*" *Id.* at 17 (internal quotation marks omitted) (emphasis added). This conclusion represents a long interpretative journey from the statute's straightforward and clear mens re requirement that a gift be given "for or because of any official act performed or to be performed."

Conduct that could trigger criminal proceedings under this interpretation includes: (1) a lawyer's financial contribution for a portrait of an admired judge even when that lawyer has no matters pending or knowledge of matters that will be pending before the judge; (2) a box of brownies given by a supportive elderly constituent to her Congressman; (3) a friend's Christmas present to the IRS Commissioner even where that person has no reason to believe that he is being or will be audited; and (4) a lobbyist who takes a government official out to lunch when he has no matters currently pending or that he knows will be pending before the official.

These individuals, if indicted, could assert the difficult-to-prove defense that the act was motivated "solely" by legitimate reasons, such as friendship, without any tinge of an improper intent. This standard, however,

ignores the practical reality that human conduct is seldom the product of unitary motivation. It is the rare person indeed who does not even fleetingly consider the possible benefits accruing from the maintenance of a good relationship with persons in positions of authority.

A standard requiring criminal defendants to establish that their actions are *solely* motivated by reasons divorced from the official's capacity to affect their interests every time they interact socially with government officials is simply unworkable. The resulting isolation of public officials from the citizens they represent and from the community in which they reside would be particularly severe for those officials with broad authority such as judges, law enforcement officials, federal benefit program employees, and others. By inserting a barrier between citizens and government officials, the "position" and "capacity" interpretations' threat of criminal liability would undoubtedly affect the exercise of the First Amendment rights of association, speech, and petition. In sum, rather than advancing the statutory goal of ensuring a healthy representative government, a broad reading of the intent statute will simply cut the strands of social interaction that bind the individuals who serve in the government to the community they represent. The tension between the real-world needs of government officials to be involved in and knowledgeable about the communities they regulate and govern and the need to protect the government from corrupting influences is resolved by a well-coordinated system of criminal liability and noncriminal regulation. While a federal employee may be subject to criminal penalty if she violates the plain language of the statute, more precise control of the noncriminal receipt of gifts is exercised through regulation.

Unlike the position and capacity interpretations, the statute's intent element establishes a clearly demarcated line between conduct that will and will not trigger criminal liability. Accordingly, an individual may – without fear of criminal prosecution – engage in normal social interactions with a government official within whose potential authority he may be, but before whom he has no current or known future matter. For instance, an attorney who has a social relationship with a judge need not worry that giving the judge a Christmas gift may trigger criminal prosecution merely because the potential exists that he may at some unknown time appear in that judge's court. In such situations, the donor would be certain that his conduct will not subject him to criminal liability. This is not to say, however, that an adversary may not file a motion to recuse that judge based upon a possible appearance of a conflict of interest created by the gift. *See* 28 U.S.C. § 455(a).

In the much smaller number of situations where a donor has a matter pending or knows of a specific matter that will be pending before an official, the statutory language puts him on notice that his intent in giving a gift to the official may become a jury question. In light of that knowledge, he can evaluate whether to make the gift. For instance, the law-school friend who has shared his season tickets to the Redskins with a judge since long before the judge assumed the bench may well decide not to change that practice when he has a matter before that judge, since he almost certainly could convince a jury that the gift was motivated by friendship rather than by an official act. However, a lawyer who has no such long-standing friendship with a judge actually presiding or who would be presiding over a specific matter involving that lawyer might decide against making such a gift because of the difficulty of convincing a jury that his intent was

innocent. Regardless whether the lawyer decided to engage in the activity, he would be able to make that decision with clear knowledge of the risk presented by the gift-giving.

The plain language interpretation of the mens rea requirement thus has two beneficial results. First, it gives effect to substantive limitations placed upon the scope of conduct subjected to criminal liability by Congress. In other words, it defers to the congressional determination of what conduct is best controlled by and merits criminal sanctions. Second, it provides clear notice to potential criminal defendants of the conduct that may subject them to criminal penalties. This permits individuals to maintain relatively normal social relationships with government officials while prohibiting the core conduct at which the statute is aimed.

B. The "Official Act" Interpretation Makes Sense in the Context of the Statute.

Furthermore, this interpretation gives effect to all parts of the statute by distinguishing between the offenses of bribery and illegal gratuities. *See Menasche*, 348 U.S. at 538-39. In addition, it gives effect to Congress' apparent decision to impose criminal liability for a relatively narrow category of serious behavior and to permit branch-by-branch regulation of less dangerous or even beneficial gift-related conduct. Thus, rather than representing an unintended gap in coverage of dangerous activity, this interpretation complements congressionally sanctioned regulatory schemes governing the receipt of gifts. Furthermore, even if such a gap in legislative coverage exists, it is the role of the legislature rather than the judiciary to fill it.

1. The "Official Act" Interpretation Separates Bribery and Gratuity Offenses.

The bribery provision subjects to criminal liability donors who give a gift in exchange for an official act. *See, e.g., United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) ("[T]he payor of a bribe must intend to engage in some more or less specific quid pro quo with the official who receives the payment."); *United States v. Bustamante*, 45 F.3d 933, 938 (5th Cir. 1995) (bribery requires that a thing of value be given *in return* for the performance of an official act) (emphasis added). In that instance, the donor not only intends to influence the official, but the giving of the gift is dependent upon his belief that he has succeeded in influencing that official. *See United States v. Brewster*, 506 F.2d 62, 72 (D.C. Cir. 1974) (a bribery offense requires that the gift and official act motivate each other in contrast to the gratuity statute where the donor's gift, although *motivated by* the official act, need not itself motivate or affect the official act).

The gratuity provision, however, imposes liability on those who give a gift with the intent to reward an official for a specific official act performed or that they hope will be performed in the future. *See, e.g., Jennings*, 160 F.3d at 1013 ("[a]n illegal gratuity . . . is a payment made to an official concerning a specific official act (or omission) that the payor expected to occur in any event."); *United States v. Patel*, 32 F.3d 340, 345 (8th Cir. 1994) (requiring that donor be motivated by a concrete "official act."). The difference between a bribe and a forward-looking gratuity is that the person giving the gratuity – as opposed to the bribe – does so without any implicit or explicit agreement that the official will take the hoped-for action in return for the gift. *See Brewster*, 506 F.2d at 72 (Unlike bribery, the gratuity and the official act need not motivate

each other.). In other words, in contrast to a bribery case, the donor's action is independent of the donee's intent. *See id.* at 72. Thus, the forward-looking gratuity is a separate and less serious offense than bribery because it does not require the corruption of a government official. *See Jennings*, 160 F.3d at 1014 ("Payment of an illegal gratuity is a lesser included offense of bribery. . . . because corrupt intent is a different and higher degree of criminal intent than that necessary for an illegal gratuity.") (internal quotation omitted); *United States v. Biaggi*, 853 F.2d 89, 101 (2d Cir. 1988) ("We think it undoubtedly true that a corrupt payment intended to influence an official act is more serious than a payment merely 'for or because of' an official act without proof of corruption, and the penalties provided by Congress reflect such an assessment.") (citation omitted); *Brewster*, 506 F.2d at 72 ("[T]he briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act.").

2. The "Official Act" Interpretation Gives Effect to Congressional Intent.

The Independent Counsel and Department of Justice contend that Congress could not have actually intended for the statute to cover only gifts made for or because of specific official acts because such an interpretation would not criminalize all conduct at odds with the statutory objective of assuring the undivided loyalty of employees to the government. *See* Pet. Br. at 38-42; DOJ Br. at 19-22. The Independent Counsel and Department of Justice attempt to remedy this perceived gap or flaw in the legislation by broadly interpreting the intent element. This approach cannot be condoned for two reasons. First, there is no reason to believe that a "gap" in coverage

exists. Congress may well have believed that ethical regulation of government officials would provide sufficient protection for the attenuated harms resulting from an attempt to obtain favorable treatment for undefined potential acts. *See* 5 U.S.C. § 7353; 5 C.F.R. § 2635.101, *et seq.*; 5 C.F.R. § 2635.202(a) (prohibiting executive branch employees from, directly or indirectly, soliciting or accepting gifts "because of the employee's official position"); H.R. Rule XXVI (amended Jan. 6, 1998); S. Rule XXXV(1)(a), (c) (amended July 18, 1995). *See also* Conflicts of Interest: Hearing Before the Committee on the Senate Judiciary, 87th Cong., 2nd Sess., 25-26 (Comm. Print 1962) (Letter from Nicholas deB. Katzenbach, Deputy Attorney General, to Hon. James O. Eastland, Chairman, Senate Judiciary Committee dated July 23, 1962) (stating that a proposed amendment to the gratuity statute by Senator Keating that would have criminalized the receipt by government officials of gifts made because of their official positions was unnecessary in light of administrative regulations governing that conduct).

Such a cautious approach by Congress would make sense because much of the conduct brought within the scope of the statute by the Independent Counsel's and Department of Justice's interpretation of the statute is not "inherently" dangerous and would thus not alert average citizens that this conduct would render them subject to criminal liability. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 441-42 (1978); *United States v. Nofziger*, 878 F.2d 442, 453-54 (D.C. Cir. 1989). In contrast, the government officials and employees to whom the regulations apply are much more likely to be aware of the adverse consequences of receiving an improper gift than the person making the gift. For instance, while it may not occur to a college administrator who – at an educational seminar – gives the Secretary of Education a school baseball cap that such conduct may constitute a gratuity under the "position" or "capacity" interpretations, the

Secretary is likely to be aware of whether ethical regulations permit him to accept it.

In addition, Congress may have concluded that those regulations – which are detailed and comprehensive – would provide a more finely tuned method of implementing the proper balance between any potential for harm caused by conduct having only an attenuated connection to official acts and recognition that government officials are members of society who interact with other members of the community. For instance, although the Office of Government Ethics has expressly prohibited status gratuities, this bar is subject to numerous exceptions, including: (1) gifts of $20 dollars or less; (2) gifts based upon a personal relationship; (3) awards and honorary degrees; and (4) gifts of refreshments at speaking engagements and other functions 5 C.F.R. § 2635.204(a), (b), (d), (g) (*as amended in* 63 Fed. Reg. 69,992 (1998)). The rules promulgated by the legislative and judicial branches also make careful distinctions between gifts that may be accepted and those that may not. *See* H.R. Rule XXVI; S. Rule XXXV(1)(a), (c); Code of Conduct for United States Judges Canon 5(C)(4). It would be odd indeed if gifts which government officials could accept within the ethical rules of their branch would subject the donor to felonious criminal liability.

3. Congress is the Proper Body to Remedy Any Legislative Gaps.

Finally, even if a gap exists, it is the role of Congress and not the judiciary to fill it. *See TVA v. Hill*, 437 U.S. 153, 194 (1978). This is especially true when an expansive statutory interpretation would implicate constitutional rights or impose criminal liability without the clear intent of Congress. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Liparota v. United States*, 471 U.S. 419, 427 (1985). Accordingly, the Court

should give effect to the language of the statute as written by Congress and hold that only donors who provide a covered official with a thing of value for or because of a specific official act (or acts) are subject to criminal liability under the gratuity statute.

II. Even if the Statute Were Ambiguous, Neither the "Official Position" nor the "Capacity" Interpretation is Consistent with the Applicable Interpretive Rules.

Even were the statutory mens rea requirement ambiguous, however, neither the position nor capacity interpretation should be adopted because they directly conflict with two fundamental precepts of statutory construction: (1) ambiguous criminal statutes must be construed in favor of potential criminal defendants; and (2) statutes, where possible, must be interpreted to avoid the infringement of First Amendment rights. Both the position and capacity interpretations impermissibly expand the scope of conduct subject to criminal sanctions and substantially dilute the statutory mens rea requirement, thus indiscriminately implicating a broad array of First Amendment activity. In the absence of clear congressional intent to the contrary, these results are inappropriate.

A. Statutes Must be Interpreted So As To Implement Congressional Decisions Regarding Criminal Liability and To Provide Adequate Notice of Criminal Conduct.

Several fundamental principles guide the interpretation of criminal statutes. First, "because of the seriousness of criminal penalties and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). In other words, individuals should not

"languish[ ] in prison unless the lawmaker has clearly said they should." *Id.* (internal quotation omitted). Thus, the rule of lenity provides that ambiguous statutory language should be construed in favor of the defendant unless to do so would conflict with the implied or expressed intent of Congress. *Liparota*, 471 U.S. at 427. Obviously, then, statutory limitations on the scope of criminal liability such as the "for or because of any official act performed or to be performed" language should be given full effect. As noted above, the plain language interpretation of the gratuity statute imposes criminal liability for a far smaller class of conduct than the "position" or "capacity" interpretations.

Second, "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed . . . [and] [t]o make the warning fair . . . the line should be clear." *Bass*, 404 U.S. at 348. Consistent with this concern that individuals should not be subject to criminal liability for crossing a criminal boundary they do not know exists or cannot clearly discern, courts should generally presume the existence of a mens rea requirement. *See Liparota*, 471 U.S. at 426. Congress may only depart from the norm of providing a mens rea requirement by affirmatively indicating its intent to do so. *See Morissette v. United States*, 342 U.S. 246, 273 (1952). Accordingly, where statutes have been silent regarding mens rea, the Court "has on a number of occasions read a state-of-mind component into an offense." *United States Gypsum Co.*, 438 U.S. at 437 (requiring the government to establish intent as an element of the crime despite the silence of the Sherman Act) (citations omitted). This presumption in favor of a mens rea requirement is particularly strong where the offense involved is a felony or where "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Liparota*, 471 U.S. at 426; *Nofziger*, 878 F.2d at 454 (refusing to treat

a statute chilling lobbying activities protected by the First Amendment as a strict liability statute where Congress had not expressed such an intent). Here, mens rea does not have to be read into the statute. The Court need only give full effect to that element already clearly established by Congress and reject the "position" or "capacity" interpretations that would so dilute it as to render it essentially meaningless.

B. Statutes Must Be Construed To Avoid Constitutional Conflicts Unless Clear Congressional Intent to the Contrary Exists.

1. Lobbying Implicates First Amendment Rights.

This Court has on several occasions indicated that lobbying constitutes political activity triggering First Amendment protections. *See United States v. Rumely*, 345 U.S. 41, 44-48 (1953) (avoiding "grave constitutional" problems created by a conflict "between the Congressional power to investigate" lobbying activities and the "limitation imposed by the First Amendment" by narrowly construing the "lobbying activities" authorized for investigation by congressional resolution.); *United States v. Harriss*, 347 U.S. 612, 620-21, 624-26 (1954) (importing *Rumely*'s narrow definition of lobbying activities to interpret the Federal Regulation of Lobbying Act of 1946 and concluding that the disclosure requirements imposed by the statute – as narrowly construed – did not violate the First Amendment because the slight "informational" burdens imposed on the lobbyists were outweighed by the vital interest of Congress in being able to evaluate the information provided by lobbyists.).

Given the unique relationship between lobbying activities and constitutionally protected rights, the gratuity statute should be interpreted in a fashion that avoids friction with these rights. The strongest indication by this

Court that lobbying is protected by the First Amendment is found in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In *Noerr*, the Court concluded that "two or more persons . . . associating together in an attempt to persuade the legislature or the executive to take a particular action with respect to a law" constituted political activity implicating the First Amendment right to petition. *Id.* at 136-138. Emphasizing the importance of the right to petition, the Court stated: "In a representative democracy such as this, [the] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Id.* at 137. In the absence of any clear indication that Congress intended to regulate such political activity, the Court refused to "lightly impute to Congress an intent to invade" the First Amendment right to petition (or lobby) the government for redress of grievances. *Id.* at 138.

Quoting the above language from *Noerr*, the Court expanded that case's implicit recognition of the constitutional aspect of lobbying to the administrative arena in *California Motor Transp. Co.*, 404 U.S. at 510-11. The Court concluded that it "would be destructive of the rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures" of the government "to advocate their causes and points of view respecting resolution of their . . . interests" without any clear indication by Congress of an intent to limit such activity. *See id.* at 508-11; *Harriss*, 347 U.S. at 631 (Douglas, J., dissenting) (noting that the lobbying legislation at issue intersected with the "domain of the First Amendment."); *id.* at 634-636 (Jackson, J. dissenting) (concluding that the right to petition implicated by the lobbying statute should be given the same protections as other First Amendment rights and that reaching "the real evils of

lobbying without cutting into the constitutional right of petition is a difficult and delicate task."); *California Motor Transport Co.*, 404 U.S. at 516-17 (Stewart, J., concurring) (*Noerr* concluded that immunity from the antitrust laws "was required in order to preserve the informed operation of the governmental processes and to protect the right of petition guaranteed by the First Amendment."); *see also Regan v. Taxation With Representation*, 461 U.S. 540, 552 (1983) (holding that statutory removal of a tax-emption for nonprofit groups who lobbied was constitutional, the Court observed that Congress was not required to subsidize the exercise of constitutional rights.); *id.* at 552 (Blackmun, J., concurring).

Numerous lower courts have explicitly expressed this Court's strongly implied recognition that lobbying is protected by the First Amendment rights to petition and to engage in political speech. *United States v. Sawyer*, 85 F.3d 713, 731 (1st Cir. 1996) (the activities of a professional lobbyist "are protected by the right to petition the Government for redress of grievance guaranteed by the First Amendment of the United States Constitution.") (internal citation omitted); *United States v. Jackson*, 72 F.3d 1379, 1386 (9th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996) (noting the "First Amendment freedoms to lobby and make donations to political causes."); *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 326 (5th Cir. 1994) ("Lobbying . . . is activity protected by the First Amendment right of petition . . . [which] guarantees all citizens the right to appeal to the legislature or judiciary and is not conditioned upon motive.") (internal quotation omitted); *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967) ("While the term lobbyist has become encrusted with invidious connotations, every person or group engaged . . . in trying to persuade Congressional action is exercising the First Amendment right of petition."); *Moffett v. Killian*, 360 F. Supp. 228, 231 (D. Conn. 1973); *Maryland Right to Life State PAC v. Weathersbee*, 975

F. Supp. 791, 797 (D. Md. 1997); *Fair Political Practices Comm'n v. Superior Court of Los Angeles County*, 599 P.2d. 46, 53 (Cal. 1979).

The rights guaranteed by the First Amendment – particularly the right to petition – perform a role essential to the proper functioning of a representative government by informing government officials of the desires of the citizens they represent. That individuals or corporations hire others to facilitate their exercise of those rights alters neither the constitutional status of the rights exercised nor the usefulness of the activity. *See Noerr*, 365 U.S. 127 (noting the societal importance and constitutional nature of the right to petition even though the specific activities at issue were undertaken on behalf of the railroad companies by a public relations firm.); *Sawyer*, 85 F.3d at 731, n.15 (the First Amendment right to petition the government protected the professional lobbyist's employment objectives of "develop[ing] contacts in the Legislature" and of attempting "to persuade and influence legislators to benefit certain interests."); *Jackson*, 72 F.3d at 1386 (a lobbyist's bribery convictions "in no way undercut our nation's commitment to the First Amendment freedom[ ] to lobby. . . . [and] casts no aspersion on the legitimate role professional lobbyists may play in facilitating the exercise of political freedom."); *Moffett*, 360 F. Supp. at 231 ("The mere fact . . . that one earns a living by exercising First Amendment rights does not vitiate the ability to assert those rights . . . one does not forfeit First Amendment rights because he pays someone to exercise them for him.") (internal citations omitted); *Fair Political Practices Comm.*, 599 P.2d. at 53 ("The lobbyist's function obviously is to exercise [the First Amendment right to petition] on behalf of his employer" and the lobbyist's activities are therefore protected by the First Amendment.).

Rather than posing an inherent danger to the political process, which must be tightly policed, lobbying "facilitate[s] the exercise of political freedom." *See Jackson*, 72 F.3d at 1386; *c.f. Nofziger*, 878 F.2d at 453. As noted by the Court in *Noerr*, 365 U.S. 127, forbidding the communication of the opinions of interested parties to their representatives would "deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition." *Id.* at 139. Indeed, Congress itself has recognized that lobbyists who disclose their clients' identities "serve a useful and perfectly legitimate purpose in expressing the views and interpretations of their employers with respect to legislation which concerns them." *Harriss*, 347 U.S. at 620, n.10 (quoting S. Rep. No. 1400, 79th Cong., 2d Sess., p. 27; Committee Print of H. Rep. on Legislative Reorganization Act of 1946, 79th Congress, 2nd Sess., pp. 32-33). In sum, lobbying aids the ability of citizens to exercise their constitutional right to petition the government for redress of grievances, allows citizens more readily to obtain information from their government officials, and aids in the effective functioning of our representative government by informing representatives of the needs and interests of the citizens. While gift-giving per se may not be constitutionally protected, a failure to draw a bright-line distinction between normal social interaction, which often accompanies the exercise of those rights, and criminalized gift-giving implicates constitutional interests.

2. Statutes Must Be Construed Where Possible to Avoid the Unintended Infringement of First Amendment Rights.

Statutes that infringe upon areas protected by First Amendment guarantees should be narrowly construed to avoid restrictions on those important constitutional rights

where the restrictions were not clearly intended by Congress. In *Noerr*, this Court refused to "lightly impute to Congress an intent to invade" conduct protected by the First Amendment right to petition. 365 U.S. at 138. *See also California Motor Transp. Co.*, 404 U.S. at 510 (quoting *Noerr*, 365 U.S. at 137-38). Citing *Harriss*, 347 U.S. 612, and *Rumely*, 345 U.S. 41, the Court stated "Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation." *Noerr*, 365 U.S. at 141. The presumption in favor of the narrow construction of legislation potentially affecting First Amendment rights is particularly strong where criminal sanctions are imposed for the violation of the statute. *See Harriss*, 347 U.S. at 634 (Jackson, J., dissenting) (stating that where a criminal statute regulating First Amendment activities "does not deal with corruption . . . legal penalties should be applied only by formulae as precise and clear as our language will permit.").

Similarly, in *Nofziger*, 878 F.2d 442, the court narrowly interpreted ambiguous statutory language in the Ethics in Government Act that imposed criminal liability for lobbying by former government employees of their former agencies under certain circumstances. *See* 18 U.S.C. § 207(c). Noting the constitutionally protected status of lobbying and that it posed no inherent danger to society, the court refused to interpret ambiguous statutory language to exclude a mens rea element. *Nofziger*, 878 F.2d at 453-54. The court also concluded that section 207(c)'s purpose "to serve the public interest in honest government," alone, was not sufficient to overcome the presumption in favor of a mens re element. *Id.* at 453. The court declined "to treat this statute as a 'public welfare' measure without clear evidence of a congressional purpose to impose strict liability because of its potential for

chilling speech." *Id.* at 454. Similarly, a broad interpretation of the gratuity statute that minimizes Congress' "specific act" intent requirement would impermissibly restrict or chill beneficial political activity by subjecting lobbyists to criminal liability for engaging in normal social relations with government officials.

C. No Congressional Intent Supports a Statutory Interpretation Expanding Criminal Liability Beyond that Provided by the Plain Language of the Statute.

For the reasons stated above, in the absence of clear congressional intent to the contrary, the gratuity statute should be interpreted to avoid the infringement of First Amendment rights and to provide clear notice of the prohibited conduct to potential criminal defendants. No such congressional intent exists here.

1. Statutory Text.

The clearest expression of congressional intent is the plain language of the statutory text. That language simply does not impose criminal liability on donors for making "position" or "capacity" gifts. Congress could easily have done so by simply defining the requisite intent to include: "for or because of the official's capacity to perform official acts" or "for or because of any official act performed, to be performed, or which might be performed." Indeed, in 18 U.S.C. § 213, Congress did criminalize the receipt of certain gratuities by bank and other financial examiners without any reference to an exercise of official authority. The statute provides: "Whoever, being [an examiner covered by the statute]. . . . accepts a loan or gratuity from any bank, corporation, association or entity examined by him or from any person connected therewith shall be" subject to criminal liability. The statute makes no mention of an official act, but simply and

unambiguously imposes liability under narrow and specifically defined circumstances. This clarity stands in sharp contrast to the vague and open-ended imposition of liability that the Independent Counsel and Department of Justice ascribe to the gratuity statute.

2. Legislative History.

Furthermore, the legislative history indicates no congressional intent to impose criminal liability for gifts given to covered officials merely because they have the capacity to affect the interests of the donor. The proposed language of the provision originally read "for or because of an official act performed." However, J.H. Macomber Jr., the General Counsel of the General Services Administration, made the "very minor" suggestion that the language "to be performed" be added because he was not sure that the language as written would apply to prospective action by the official. Hearings Before the Antitrust Subcomm. (Subcomm. No. 5) on the House Comm. of the Judiciary, 86th Cong. 2d Sess., Federal Conflict of Interest Legislation 87-88 (Comm. Print 1960). The casual adoption of this phrase belies any intent to dramatically change the nature of the statute from one merely imposing criminal liability for gifts given for or because of specific official acts performed to one imposing liability for gifts given for or because of the position of the donee or because of his capacity to affect the donor's interests.

This conclusion is supported by Congress' decision not to adopt proposed language that clearly would have brought the acceptance of "position" or "capacity" gifts by federal employees within the scope of the statute. Senator Keating proposed an amendment that would have "prohibit[ed] any government employee from soliciting or accepting any gift from any person where the employee has reason to believe that such person . . . conducts operations or activities which are regulated by

the employee's agency or . . . has interests which may be substantially affected by the employee's performance or nonperformance of his official duties." *See* S. Rep. No. 2213, 87th Cong. 2d Sess. 19 (1962), reprinted in 1962 U.S.C.A.A.N. 3852, 3867 (Senator Keating's views). Although Senator Keating withdrew his proposed amendment prior to floor debate, Congress' failure to adopt this language nonetheless suggests that it did not intend to impose liability for gifts relating only to official position or capacity rather than to specific official acts. *Cf. Immigration and Naturalization Serv. v. Cardoza-Forseca*, 480 U.S. 421, 442-43 (1987).

The only legislative history offered by the Independent Counsel in direct support of the "position" reading of the intent element is the statement during the floor debate by Senator Lindsay that the gratuity statute would "elevate[ ] to statutory level some important restraints now in regulations or not covered, particularly relating to gifts and the use of office to obtain something from persons doing business with the Government. . . . " Pet Br. at 35 (citing 1961 Cong. Rec. 14780 (Aug. 7, 1961)). The Independent Counsel concedes that this authority is generally not considered to be persuasive evidence of congressional intent. *Id.* Even Lindsay's comment, however, supports the reading that liability should not be imposed absent a specific act or "use of office." He did not suggest that the mere "capacity to use one's office" to obtain a thing of value would be sufficient to impose criminal liability. This statement simply does not support the almost boundless "position" or "capacity" liability asserted by the Independent Counsel and the Department of Justice. Thus, the legislative history provides no support for these expansive interpretations of the statute.

CONCLUSION

The plain language of the gratuity statute imposes a mens rea requirement that is clear and precise. Congress intentionally created in that statute a bright-line rule placing potential criminal defendants on notice that conduct threatening the health of the political process is forbidden. At the same time, it crafted a rule that would not risk chilling or punishing conduct historically associated with the exercise of First Amendment rights. The gratuity statute is not ambiguous, and it is not incomplete. The phrase "for or because of any official act performed or to be performed" not only means what it says; it fully accommodates the fundamental precepts that neither expansion of criminal liability nor restriction of conduct implicating First Amendment rights are to be lightly inferred. Should the Independent Counsel or the Department of Justice desire a broader reach for this statute, they should seek relief from Congress, not from this Court. The Court should hold that the gratuity statute is violated only where the donor acts for or because of a specific official act performed or to be performed, and affirm the judgment of the court of appeals.

Respectfully submitted,

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